FISHER communications

Fisher Communications, Inc.
140 4th Avenue N., Suite 500
Seattle, WA 98109
Tel: (206) 404-7000
www.fsci.com

Randa Minkarah
Senior Vice President
Business Development
randam@fsci.com

August 30, 2010

Via Electronic Comment Filing System

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

Re: Written *Ex Parte* Response
In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, MB Docket No. 10-71

Dear Ms. Dortch:

On June 29, 2010, the National Telecommunications Cooperative Association filed an *ex parte* notice in the above-referenced proceeding on behalf of Canby Telcom ("Canby") with respect to an email communication that Mr. Keith Galitz, President of Canby, sent to Ms. Eloise Gore, Associate Chief, Media Bureau, on June 28, 2010. That communication purports to describe Canby's experience in negotiating a retransmission consent agreement with Fisher Communications, Inc. ("Fisher") for carriage of Station KATU-TV, Portland, Oregon, on Canby's system. Canby's letter, however, is riddled with false statements and flagrant misrepresentations of the facts. Canby's letter demands a response.

Canby suggests that Fisher abused its "power" to "demand any price in a take it or leave it offer"; asserts that "Fisher rejected all counter offers, refusing to consider anything [sic] price other than the one they dictated"; alleges that "Fisher considered us and our subscribers a low priority and did not care if the station went dark"; and claims that it was only as a result of Canby getting congressional offices involved that Fisher "finally returned our calls [and] we were able to negotiate a deal with Fisher to carry the local ABC affiliate." These statements and claims are demonstrably false.

1. I was during the period in question (and remain today) the Fisher executive with responsibility for retransmission consent negotiations.

2. It was Fisher, not Canby, that initiated negotiations for retransmission consent and carriage when I mailed a proposed agreement to Canby on November 19, 2008. From the beginning, Fisher took account of Canby's relative size by proposing a simplified, short-form agreement, which Fisher routinely does for smaller MVPDs.

3. It was nearly a month later, on December 18, 2008, that I was first contacted by Canby's outside counsel seeking confirmation that I was the appropriate representative to negotiate with. I responded the same day informing Canby's counsel that I was.

4. It was not until December 29, 2008, that Fisher received Canby's initial response to Fisher's proposal. In other words, Canby did not respond until it had Fisher's proposal for nearly six weeks and until there were only two days remaining before its retransmission consent for carriage of KATU expired.

5. On December 30, 2008, the next day, Fisher responded with a proposed reduced and compromised rate.

6. On December 31, 2008, I had numerous communications with Canby's legal counsel. Initially, I was informed that Canby's initial counteroffer was incorrect, and I was later provided with a revised offer. Fisher responded with a second rate reduction and compromise, and I informed Canby's counsel that I would be available all day. Canby's counsel subsequently communicated a new offer from Canby. In response, Fisher offered a third rate reduction and compromise. Canby's counsel acknowledged receipt of this offer and informed me that she was waiting to hear back from Canby. At 8:31 pm, Canby's counsel informed me that she had attempted to contact her client multiple times but had yet to hear back from Canby. At 8:35 pm, I informed Canby's counsel that I would continue to be available to continue talking. At 8:37 pm, Canby's counsel acknowledged receipt of my email. Although it was New Year's Eve, as well as my birthday, I cancelled my plans for the evening and waited until after midnight; however, I received no additional communications from Canby or its counsel that evening.

7. Thus, with Fisher having made three rate concessions and compromises since its initial proposal, Canby abandoned the negotiating table and allowed its retransmission consent to carry KATU to expire and lapse.

8. Although Canby no longer had authorization to retransmit KATU to its subscribers, it continued to do so in express violation of the Communications Act and the Commission's rules. On Friday, January 2, 2009, I was finally contacted again by Canby's counsel, who indicated that Fisher's third rate concession offer was communicated to Canby. Later that day, Canby's attorney communicated a new offer from Canby, and Fisher responded that same day with a fourth rate reduction and compromise.

9. Canby continued to retransmit KATU without authorization over the weekend, and on Monday, January 5, 2009, Canby's counsel communicated a new offer from Canby. Because Canby had continued to retransmit KATU without consent, Fisher engaged its outside counsel to discuss the situation with Canby's counsel. At my instructions, Fisher's counsel reminded Canby's counsel that Canby's retransmission consent had expired on December 31.

10. On January 6, 2009, Canby finally removed KATU from its system.

11. On January 7, 2009, Canby's counsel and Fisher's counsel communicated again by telephone. Fisher's counsel relayed to me that Canby did not provide a new offer but instead asked Fisher to make another concession.

12. On January 8, 2009, Canby's counsel and Fisher's counsel again spoke by phone and arranged for Canby's President, Keith Galitz, to speak with me.

13. On January 9, 2009, which was nine days after Canby's retransmission consent had expired and more than 50 days after I mailed Fisher's first proposal, I was, at last, able to speak with an executive of Canby, rather than with Canby's outside lawyer. I spoke with Mr. Galitz; Fisher offered a fifth rate reduction and concession; and Mr. Galitz agreed to the rate. Fisher also provided Canby with temporary retransmission consent until January 23, 2009, to enable the parties to finalize the paperwork, thereby enabling Canby to re-launch KATU, which it did that day. In addition, and significantly, Fisher also gave Canby retroactive consent for the period during which Canby was illegally retransmitting KATU.

14. During the following two weeks Mr. Galitz raised an issue that I believed had already been resolved. There were multiple email communications and the parties' outside counsels had several discussions

during this time frame until, finally, on January 23, 2009, Mr. Galitz and I spoke by telephone. Fisher made a sixth rate reduction and concession to resolve the final open issue, and the contract was finally executed on January 26, 2009.

15. I declare, under penalty of perjury, that the facts set forth in numbered paragraphs 1-14 are true and correct to the best of my knowledge, information, and belief.

As these facts make clear, Canby's various allegations in its *ex parte* communication about its negotiation with Fisher are not true:

First, Fisher made three rate concessions from its initial proposal before Canby abandoned the negotiating table on the evening of December 31. It subsequently made three additional rate concessions, for a total of *six* rate concessions, before the agreement was executed. Fisher, plainly, did not "demand any price in a take it or leave it offer," as Canby claims.

Second, Fisher promptly considered and responded to every Canby offer. Canby's allegation that "Fisher rejected all counter offers, refusing to consider anything [sic] price other than the one they dictated" is, again, plainly not true.

Third, it was Canby, not Fisher, that delayed until two days before expiration of its authorization for carriage of KATU to respond to Fisher's initial offer for continued carriage. And it was Canby, not Fisher, that abandoned the negotiations on December 31. Canby's allegation that "Fisher considered us and our subscribers a low priority and did not care if the station went dark" is simply false. It was Canby that played a needless game of brinksmanship with its own subscribers. And it was Canby's cavalier attitude about the negotiation process that resulted in Canby illegally continuing to retransmit KATU without authorization—an activity Canby only ceased after Fisher had to engage outside counsel in the matter.

Fourth, Canby's claim that it was only as a result of Canby getting congressional offices involved that Fisher "finally returned our calls [and] we were able to negotiate a deal with Fisher to carry the local ABC affiliate" is also plainly wrong. Fisher or its outside counsel communicated with Canby's outside counsel on December 30, December 31, January 2, January 5, January 7, and January 8 (and sometimes multiple times on those days) all before Mr. Galitz finally got personally involved in the negotiations on January 9. What got the deal done, in my opinion, was not Canby's communications with congressional offices, which were irrelevant to the negotiations, but the fact that Canby was at risk of liability for its unauthorized carriage of KATU for five days.

In addition to its misrepresentations with respect to the negotiations between the two companies, Canby also claims that Fisher made unreasonable rate demands. However, the rates Fisher negotiated with Canby are consistent with the rates Fisher negotiated with dozens of other MVPDs, including some substantially larger than Canby.

Moreover, Canby claims that retransmission consent fees, such as those negotiated with broadcasters such as Fisher, are not fair and are responsible for a "whopping 51.75%" increase in Canby's programming costs for its "Economy TV" package. However, Canby's own submission shows that its programming costs for its "Economy TV" package are just under $2.12 per subscriber per month (Canby *ex parte* submission, Attachment E), but Canby's website shows that Canby actually charges its subscribers $21.95 per subscriber per month to receive its Economy TV package (*see* Canby Telcom, Television Services, *available at* <http://www.canbytel.com/television/feed/>, visited July 28, 2010).

Canby's programming costs for broadcast television are, therefore, less than 9.7% of what Canby charges its subscribers for the service. In other words, Canby charges its subscribers *more than 10 times* what it costs Canby in programming fees! Furthermore, Canby's "whopping 51.75%" increase in programming costs—less than $0.60 per subscriber per month—is just 2.7% of what Canby actually charges its subscribers.

In short, not only are Canby's allegations about Fisher false, but Canby's broader claims about the retransmission consent marketplace are incorrect.

For the reasons the National Association of Broadcasters and the four Affiliate Associations, the broadcast television networks, and numerous other broadcasters have already provided in this docket, the Commission should allow market negotiations and processes to work without government interference.

Please let me know if I can provide any additional information concerning Fisher's negotiations with Canby.

Sincerely,

Randa Minkarah
SVP Business Development

cc: Eloise Gore